

DEPARTMENT OF STATE REVENUE

04-20180634.LOF

Letter of Findings Number: 04-20180634
Use Tax
For Tax Year 2014

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

A recreational vehicle ("RV") was used in Indiana by an Indiana resident. The Department found that the purchase and titling of the RV by a Montana LLC was a sham transaction. The Indiana resident was responsible for Indiana use tax on the RV since no sales tax was paid at the time of the purchase.

ISSUES

I. Use Tax—Recreational Vehicle.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-8.1-5-1; *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); *Gregory v. Helvering*, 293 U.S. 465 (1935); *Comm'r v. Transp. Trading & Terminal Corp.*, 176 F.2d 570 (2nd Cir. 1949); *Horn v. Comm'r*, 968 F.2d 1229 (D.C. Cir. 1992); [45 IAC 2.2-3-4](#).

Taxpayer protests the imposition of use tax on the use of a recreational vehicle.

II. Tax Administration—Penalty and Interest.

Authority: IC § 6-8.1-10-1; IC § 6-8.1-10-2.1; IC § 6-8.1-5-1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of penalties and interest.

STATEMENT OF FACTS

Taxpayer is an individual and is a resident of Indiana. The Indiana Department of Revenue ("Department") determined that Taxpayer owed use tax on the purchase of a recreational vehicle ("RV") by a Montana LLC. Thus the Department issued a proposed assessment for use tax, penalty and interest for the year 2014. Taxpayer protests that the RV was purchased and titled by a Montana LLC and that no Indiana sales or use tax is due. An administrative hearing was conducted and this Letter of Findings results. Further facts will be supplied as required.

I. Use Tax—Recreational Vehicle.

DISCUSSION

As a threshold issue, it is Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing. . . [courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014). Thus, all interpretations of Indiana tax law contained within this decision, as well as the preceding audit, shall be entitled to deference.

Turning to the relevant law, sales tax is imposed by IC § 6-2.5-2-1. That statute states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

Use tax is imposed under IC § 6-2.5-3-2(a), which states:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

IC § 6-2.5-3-1(a) defines "use" as "the exercise of any right or power of ownership over tangible personal property."

Also, [45 IAC 2.2-3-4](#) provides:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, when tangible personal property is acquired in a retail transaction and is "stored, used, or otherwise consumed in Indiana," use tax is due if sales tax has not been paid at the point of purchase.

The Department imposed use tax after determining that no sales or use tax had been paid on the purchase of the RV. The Department's letter regarding the RV, states in part:

The Department of Revenue has documentation that a RV was purchased by you from an out of state dealer. A Bureau of Motor Vehicles (BMV) record search does not reveal this recreational vehicle to have been titled or tax paid to the BMV on this purchase. Per audit review completed by desk audit division of the Department of Revenue this purchase is subject to Indiana sales tax as tax was not paid at the time of purchase. The RV was titled in the state of Montana in the name of [Company M] LLC.

The Department's letter further states that Taxpayer filed an IT-40 Indiana resident return and has an Indiana residential property as her residence.

Taxpayer, in response, states that although she is an Indiana resident, that she "maintains a residence" in both Indiana and Kentucky in order to be near rental real estate properties. Taxpayer states that the RV was purchased in Ohio and that the RV is in fact stored in Kentucky, and that the RV is registered to a Montana LLC. In support of their position, Taxpayer provided the Department with the Kentucky storage facility address and pictures of the RV at the facility in Kentucky. Taxpayer states that the RV is housed at the Kentucky facility when it is not being used. Taxpayer also provided the Department with fuel log receipts and travel log receipts. A review of the documentation that Taxpayer provided shows that the Montana LLC purchased the RV from an Ohio RV sales company in 2014. On the purchase agreement it shows the Montana LLC as the buyer, no sales tax paid, and the signature line for the buyer is signed by Taxpayer. A copy of Taxpayer's travel log was provided containing entries that stated the vehicle had been driven through Indiana, among other states. Copies of gas station receipts from stations in various states were also provided. As part of its protest Taxpayer also had copies of IRS information for the Kentucky facility where the RV is stored.

Taxpayer further states that "previous Indiana letters of findings that were reviewed raised the question of a Montana LLC as a sham." The Department notes that the United States Supreme Court case of *Gregory v. Helvering*, 293 U.S. 465 (1935) is of importance. *Gregory* was a case involving a corporate reorganization:

Petitioner in 1928 was the owner of all the stock of United Mortgage Corporation. That corporation held among its assets 1,000 shares of the Monitor Securities Corporation. For the sole purpose of procuring a transfer of these shares to herself in order to sell them for her individual profit, and, at the same time, diminish the amount of income tax which would result from a direct transfer by way of dividend, she sought to bring about a 'reorganization' under section 112(g) of the Revenue Act of 1928, c. 852, 45 Stat. 791, 816, 818, 26 USCA s 2112(g), set forth later in this opinion. To that end, she caused the Averill Corporation to be

organized under the laws of Delaware on September 18, 1928. Three days later, the United Mortgage Corporation transferred to the Averill Corporation the 1,000 shares of Monitor stock, for which all the shares of the Averill Corporation were issued to the petitioner. On September 24, the Averill Corporation was dissolved, and liquidated by distributing all its assets, namely, the Monitor shares, to the petitioner. No other business was ever transacted, or intended to be transacted, by that company. Petitioner immediately sold the Monitor shares for \$133,333.33. She returned for taxation, as capital net gain, the sum of \$76,007.88, based upon an apportioned cost of \$57,325.45.

Id. at 467. Regarding the corporate reorganization, the U.S. Supreme Court held that "[t]he whole undertaking" was a "form of conveyance masquerading as a corporate reorganization, and nothing else." *Id.* at 470.

The courts have subsequently held that "in construing words of a tax statute which describe [any] commercial or industrial transactions [the court is] to understand them to refer to transactions entered upon for commercial or industrial purposes and not to include transactions entered upon for no other motive but to escape taxation." *Comm'r v. Transp. Trading & Terminal Corp.*, 176 F.2d 570, 572 (2nd Cir. 1949), *cert. denied*, 338 U.S. 955 (1950). "[T]ransactions that are invalidated by the [sham transaction] doctrine are those motivated by nothing other than the taxpayer's desire to secure the attached tax benefit" but are devoid of any economic substance. *Horn v. Comm'r*, 968 F.2d 1229, 1236 (D.C. Cir. 1992). In determining whether a business transaction was an economic sham, two factors can be considered: "(1) did the transaction have a reasonable prospect, *ex ante*, for economic gain (profit), and (2) was the transaction undertaken for a business purpose other than the tax benefits?" *Id.* at 1237.

Taxpayer states that the reason the Montana LLC was formed was because:

Taxpayer owned a previous motorhome. That motorhome was involved in an accident and caused taxpayer to be concerned for legal liability for a moving heavy object traveling on the highway or having visitors around it. When the present motorhome was bought, taxpayer acquired it in [Company M] LLC as a way to decrease the personal liability exposure for vehicle ownership, a valid business purpose.

Taxpayer does not provide any case law to support her contention that avoiding *personal liability exposure*, for what is functionally used as a *personal* recreation vehicle, is a valid *business purpose*. And even if, *arguendo*, there was a business purpose, that purpose could be accomplished by forming an LLC in any state (e.g., the LLC could have been formed in Indiana since Taxpayer is an Indiana resident or the LLC could have been formed in Kentucky since that is where Taxpayer contends the RV is stored). The location the LLC was formed, however, was Montana, a state that does not have sales tax. Also, Taxpayer's stated business purpose to limit her personal liability in the event of an accident would seem to be what insurance is for.

The Department notes that Taxpayer did not provide the Department with the articles of incorporation for the Montana LLC, nor the corporate minutes for the LLC. It is not clear what "business" the Montana LLC conducts—there is no evidence of a rental stream for payments by Taxpayer to the Montana LLC for the use of the RV. At the hearing Taxpayer stated that the RV is used on yearly trips to visit relatives in Montana, which again is not a business function. Taxpayer's use of the Montana LLC to purchase the RV resulted in no sales or use tax being paid to any state. Thus the Department finds that the purchase of the RV by the Montana LLC was a sham transaction.

With that analysis in place, the question remains whether or not the RV was *used* in Indiana for use tax law purposes. As will be seen below, the Department finds that the RV was used in Indiana and that it is subject to Indiana use tax law. At the hearing, Taxpayer stated that the RV has been driven through Indiana and that on occasion the RV has been parked overnight at an Indiana store's parking lot. The travel log shows that the vehicle has been driven through Indiana on more than one occasion. Additionally, the Department's letter to Taxpayer states that she filed an "IT-40 Indiana resident return" and that she has an Indiana driver's license. Thus, after the sham transaction analysis the Department finds the following: (1) an RV was bought in Ohio by a Montana LLC (Taxpayer signed the purchase agreement); (2) no sales tax or use tax for the RV was paid to any state (Note: if use tax was paid to another state for the RV, Taxpayer may be able to claim a credit against Indiana use tax); (3) Taxpayer argues the RV is stored in Kentucky (e.g., Taxpayer provided photographs of the Kentucky storage facility); and (4) the RV is driven on Indiana roads by an Indiana resident.

Taxpayer's argument focused on where the RV is stored, but storage is only one component of the use tax law. Under IC § 6-2.5-3-2 use tax "is imposed on the storage, use, or consumption of tangible personal property in Indiana," and in the case at hand Taxpayer used the RV in Indiana (i.e., the use was that the RV was driven on Indiana roads and, on occasion, the RV was parked at parking lots in Indiana). Pursuant to IC § 6-2.5-3-1(a),

Taxpayer exercised a right or power of ownership over the RV by using the RV on Indiana roads. Taxpayer has not met her burden of proof imposed under IC § 6-8.1-5-1.

FINDING

Taxpayer's protest is denied.

II. Tax Administration—Penalty and Interest.

DISCUSSION

Taxpayer was assessed negligence penalties pursuant to IC § 6-8.1-10-2.1; interest was also assessed and cannot be waived pursuant to IC § 6-8.1-10-1(e). The Department notes that penalty waiver is permitted if a taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. [45 IAC 15-11-2\(b\)](#) clarifies the standard for the imposition of the negligence penalty as follows:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at [45 IAC 15-11-2\(c\)](#) as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer did not develop any argument regarding the penalty. As noted in **Issue I** (*supra*), the Department found the purchase and titling of the RV by the Montana LLC was a sham transaction. Taxpayer's protest is denied pursuant to IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest of the imposition of penalties and interest is denied.

SUMMARY

Taxpayer's protest of the use tax assessment on the RV is denied. Taxpayer's protest of the penalty and interest is also denied.

August 2, 2018

Posted: 10/31/2018 by Legislative Services Agency

